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No. 07-1015

IN THE
Supreme Court of the United States

JOHN D. ASHCROFT, former Attorney General, *et al.*,
Petitioners,

v.

JAVAID IQBAL, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR RESPONDENTS MICHAEL ROLINCE, FORMER CHIEF OF THE FEDERAL BUREAU OF INVESTIGATION'S INTERNATIONAL TERRORISM OPERATIONS SECTION, COUNTERTERRORISM DIVISION, AND KENNETH MAXWELL, FORMER ASSISTANT SPECIAL AGENT IN CHARGE, NEW YORK FIELD OFFICE, FEDERAL BUREAU OF INVESTIGATION IN SUPPORT OF REVERSAL

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ARGUMENT

RESPONDENTS MICHAEL ROLINCE AND KENNETH MAXWELL ARE PARTIES TO THE PROCEEDING ENTITLED TO SEEK AND OBTAIN RELIEF.

Contrary to the argument in footnote six on page 45 of respondent Javaid Iqbal's brief, respondents Michael Rolince and Kenneth Maxwell may seek and obtain relief from this Court based on the questions presented by petitioners John Ashcroft and Robert Mueller.

A. ROLINCE AND MAXWELL MAY OBTAIN RELIEF FROM THIS COURT.

As parties to the proceedings below, Rolince and Maxwell are respondents under Sup. Ct. R. 12.6 to this proceeding and are entitled to relief from this Court. Sup. Ct. R. 12.6 states in relevant part: "All parties to the proceeding in the court whose judgment is sought to be reviewed are deemed parties entitled to file documents in this Court. . . . Parties who file no document will not qualify for any relief from this court."

In *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 783 n.14 (1980), the Court stated that a party in the proceeding below is "automatically joined as a respondent" when another party seeks certiorari, and, "in that capacity, he may seek reversal of the judgment of the Court of Appeals on any ground urged in [the

circuit] court."[1] *Id.* In *O'Bannon*, the Third Circuit reversed the district court's judgment in favor of two defendants – the Department of Health, Education, and Welfare ("HEW") and the Pennsylvania Department of Public Welfare ("DPW"). Only the DPW, however, filed a petition for a writ of certiorari, which was granted. *Id.* at 783. Nonetheless, because HEW was joined as a respondent, the Court reversed the Third Circuit's judgment with respect to both the DPW and HEW. *Id.* at 783 n.14, 790; *see also Dir., Office of Workers' Comp. Programs, U.S. Dep't Labor v. Perini*, 459 U.S. 297, 304-305 n.12 (1983) (respondent still had a "sufficient interest" in the question presented before the Court, such that he had standing to address the merits of the Court of Appeals decision, even though he had not filed a petition for certiorari).

Here, Rolince and Maxwell were parties to the Second Circuit proceedings, and they have a significant interest in both questions presented as fellow high-ranking Federal Bureau of Investigation ("FBI") supervisors potentially subject to personal liability under *Bivens*. They are seeking reversal of the ruling below on the same grounds – qualified immunity – as they (and petitioners) did in the Court of Appeals.

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[1] *O'Bannon* addressed the predecessor to Sup. Ct. R. 12.6.

B. ROLINCE AND MAXWELL HAVE ADDRESSED ONLY THE QUESTIONS PRESENTED IN THE WRIT OF CERTIORARI AND ARE NOT EXPANDING THE ISSUES BEFORE THE COURT.

Without citation to any authority, Iqbal states that "the questions presented are limited to whether the lower courts properly determined that respondent had adequately alleged claims against [Ashcroft and Mueller]" and that "no Rule permits respondents to expand the questions presented to the Court so as to encompass the sufficiency of the allegations made against each respondent individually." Respondent Iqbal Br. 45. Rolince and Maxwell, however, did not raise additional questions in their opening brief or alter the substance of the questions presented in Ashcroft's and Mueller's petition for writ of certiorari. Rolince and Maxwell, like petitioner Mueller, are high-ranking FBI supervisory officials and are entitled to be held to the same standards to which Mueller is held. In any event, under Sup. Ct. R. 24(1)(a), "[t]he phrasing of the questions presented need not be identical with that in the petition for a writ of certiorari or the jurisdictional statement, but the brief may not raise additional questions or change the substance of the questions already presented in those documents." Rolince's and Maxwell's merits brief argues the same questions as those presented in Ashcroft's and Mueller's petition for a writ of certiorari.

Moreover, as the Solicitor General explains in Ashcroft's and Mueller's petition for a writ of certiorari, Ashcroft and Mueller properly raised the issues encompassed in the questions presented in the Court

of Appeals. Rolince and Maxwell also raised these issues in the Second Circuit and joined Ashcroft's and Mueller's briefing there to the extent it was applicable to Rolince and Maxwell. Reply Brief of Defendants-Appellants at 2 n.1, *Elmaghraby et al. v. Hasty et al.*, 490 F.3d 143 (2d Cir. 2007) (No. 05-5768-cv(L)).

CONCLUSION

Rolince and Maxwell may seek and obtain relief under Sup. Ct. R. 12.6 and relevant precedent. Accordingly, for the reasons set forth in their opening brief, Rolince and Maxwell respectfully request that this Court reverse the Second Circuit's decision affirming the district court's denial of Ashcroft's and Mueller's, and Rolince's and Maxwell's, motions to dismiss Iqbal's First Amended Complaint and direct entry of judgment in favor of Ashcroft, Mueller, Rolince, and Maxwell.

Respectfully submitted,

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